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IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-115.

DONALD R. McVEAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

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PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

Petitioner, Donald R. McVean, respectfully prays that this Honorable Court grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, heretofore submitted in this cause and as grounds therefor constituting intervening circumstances of substantial or controlling effect and substantial grounds available to petitioner although not previously presented, states the following:

POINT FOR REVIEW.

Petitioner Has Been Denied His Constitutional Privilege Against Double Jeopardy as Contained in the Fifth Amendment and Enforceable Against the States Through the Fourteenth Amendment.

REASON FOR GRANTING THE PETITION.

Petitioner Has Been Denied His Constitutional Privilege Against Double Jeopardy as Contained in the Fifth Amendment and Enforceable Against the States Through the Fourteenth Amendment.

"The Fifth Amendment guaranty against double jeopardy, which is enforceable against states through the Fourteenth Amendment, consists of three separate Constitutional protections: (1) protection against second prosecution for the same offense after acquittal; (2) protection against second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072.

It is protection number three (3) upon which petitioner relies in this petition.

"Consecutive trials might conflict with the due process guaranty if they involve 'fundamental unfairness'." *Hoag v. New Jersey* (1958) 356 U. S. 464, 2 L. Ed. 2d 913, 78 S. Ct. 829, reh. den. 357 U. S. 933, 2 L. Ed. 2d 1375, 78 S. Ct. 1366. *Benton v. Maryland,* 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056. *Simpson v. Florida,* — U. S. —, 29 L. Ed. 2d 549, 91 S. Ct. —. *Stanley v. U. S.,* — U. S. —, 27 L. Ed. 2d 242, — S. Ct. —.

Was Petitioner Granted His Constitutional Guaranty of Due Process or Was His Persecution "Fundamental Unfairness"?

Petitioner, in his "STATEMENT OF THE CASE" contained in his Petition for Certiorari, stated that he was charged in the Circuit Court of the State of Florida with, *in addition to other charges,* selling and possession of an hallucinogenic drug. The "other charges" must here be noted.

From the short courtship of Police Officer Canali with petitioner (April and May of 1968), the petitioner was arrested and charged in State Court as follows:

1. Possession of marijuana on April 14, 1968. Directed verdict of acquittal.

2. Selling hashish on April 19, 1968. Jury trial resulted in "guilty" verdict. Petitioner sentenced to six months to five years in the State Penitentiary at hard labor.

3. Selling the identical hashish on the identical night of April 19, 1968 as set forth in number two (2) above. Dismissed by the State on June 6, 1968 after bond posted and premium therefor paid.

4. Possession of one-half of the same hashish "sold" in numbers two (2) and three (3) above on April 20, 1968. Tried by a jury on September 23, 1968 and found "not guilty".

5. Possession of marijuana on May 4, 1968. Tried by a jury on December 11, 1968 resulting in a "guilty" verdict. Petitioner sentenced to six (6) months to five (5) years in the State Penitentiary at hard labor, said sentence to run consecutively (sic) to prior sentence of six months to five years at hard labor.

6. Selling an hallucinogenic drug on May 13, 1968. Dismissed by the State on November 27, 1968 based on the holding in *Panzavecchia v. State,* D. C. A. 3rd Dist., Fla., 1967, 201 So. 2d 762, as pointed out by Justice Simpson in his special concurring opinion made a part of the Petition for Certiorari filed in this cause.

7. Possession of an hallucinogenic drug on May 17, 1968. Dismissed by the State for the same reason as number six (6) above on November 27, 1968. Filed in Federal Court nineteen months after the alleged offense occurred and part of the subject matter of this petition.

8. Sale of the identical hallucinogenic drug petitioner allegedly "possessed" in number seven (7) above. Dismissed the same as number six (6) and seven (7) above and filed in the Federal Court with number seven (7) above.

9. Possession of marijuana on May 17, 1968. Dismissed by the State.

10. The two cases here under consideration of "possession" and "sale" of the same hallucinogenic drug on May 17, 1968 in the Federal Court. The same as cases number seven (7) and eight (8) above. Numerous references to case number six (6) above sprinkled throughout the trial. Petitioner found guilty of both counts and sentenced to one year on each count with the sentences to run consecutively.

CONCLUSION.

"Fundamental unfairness" in the State's multifarious prosecutions of an accused is just as great a deprivation of an accused's constitutional privilege against double jeopardy as is the trying of an accused numerous times for one offense.

It takes many pages of truly abstract reasoning to hold that a person who "possessed" an object before he "sold" the same object has violated the peace and dignity of the state more than once.

For the reasons herein expressed, petitioner respectfully requests of this Honorable Court an order granting the writ of certiorari as heretofore requested and staying the mandate of this Court.

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
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Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I, the undersigned, herewith certify that the foregoing Petition is presented in good faith and not for delay and that said Petition is restricted to the grounds as set forth in Rule 58, Supreme Court Rules.

LEMUEL S. HUNNICUTT.

CERTIFICATE OF SERVICE.

Affidavit of Certificate of Service under separate cover.